89-1522

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

PAWNEE PRODUCTION SERVICE, INC.; WILLIAM J. FRUSHER; DAVID H. FRUSHER; and THOMAS A. FRUSHER,
Petitioners.

v.

BAZINE STATE BANK,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF KANSAS

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Date: March 19, 1990

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

Does the failure to give notice and provide an opportunity for a hearing before entry of default judgment against a *pro se* party who has appeared in the action violate the due process requirement of the 14th Amendment?

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OPINIONS BELOW

The Opinion of the Kansas Supreme Court is reported at 245 Kan. 490 and is reprinted at page 1a of the appendix.

JURISDICTION

The Opinion of the Kansas Supreme Court was entered on October 27, 1989. A timely Motion for Rehearing was denied on December 18, 1989. This Petition is filed within 90 days of that date. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution, provides in pertinent part:

> § 1. Citizenship; privileges or immunities; due process clause. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

On December 30, 1986, Bazine State Bank ("Bank") filed an action in State District of Ness County, Kansas, and served these Petitioners. The Petition alleged that the Petitioners herein had defaulted on loans in excess of $290,000.00. On January 19, 1987, the Petitioners appearing *pro se* sought and were granted a Clerk's ten day Extension of Time to Answer. On January 29, 1987, Petitioners appearing *pro se* moved the State Court for an extension of twenty days in order to secure counsel to represent them. The Court took no action on the Motion. Before that period of extension would have expired, Petitioners appearing *pro se* again moved the Court for another ten day extension to March 5, 1987, and set the same for hearing on February 23, 1987. Both the Motions to the Court specified that the reason for the requested extension was to obtain counsel.

A Hearing on the Petitioners' Motion for Extension of Time to Answer was held on February 23, 1987, at which William Frusher appeared *pro se*, but the Trial Court took no action on that Motion or on plaintiff's oral motion for default. Instead the Trial Court set the case for trial in 30 days and granted the Bank's Motion for Delivery of

Personal Property securing the notes allegedly in default. The following colloquy occurred at that hearing:

> MR. LARSON: Well, Your Honor, I guess our point is, the law is very clear on establishing the times for these things to be done. That time has long expired. It expired again, and it expired again, and that's really working to the disadvantage of the bank in this case, Your Honor.
>
> THE COURT: Well, I understand that, but I can go ahead and set it for trial, they can show up on March 23, and say we still can't hire an attorney. We try the case, Mr. Larson, and I believe the Court would set it aside. You want to try doing it that way, I'll set it for trial on March 23.
>
> MR. LARSON: That could be fine, Your Honor.
>
> THE COURT: And notify Mr. Allison [1], notice him.
>
> MR. LARSON: Sure.
>
> THE COURT: For trial.
>
> MR. LARSON: That would be fine, Your Honor.
>
> THE COURT: Do you think, Mr. Frusher, you'd be ready for trial on March 23rd?
>
> MR. FRUSHER: Yes, that would be fine.

Tr. Feb. 23, 1987, at page 11. Following this Hearing, the Bank moved the Court for default judgment and noticed the Petitioners for a Hearing on March 23, 1987, the same day the Trial Court set the case for trial.

On the scheduled day of the trial, inclement weather purportedly kept the trial judge from appearing. The Bank's attorney appeared, as did William Brusher for Petitioners, each unaware of the other's presence. No proceedings occurred. William Frusher returned to his office in the Courtroom. Two days later, and without notice to Petitioners, the Bank's attorney called the judge and represented that Petitioners had not appeared at the time set

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[1] Mr. Allison, an attorney, had been contacted by the defendants regarding his possible representation of them in this and other matters.

for the trial. The trial judge entered default judgment against Petitioners without notice or a hearing.

Following the entry of default judgment, Petitioners were able to secure counsel and began negotiations with the Bank's counsel. In September of 1987, the Bank agreed to suspend enforcement of the default judgment and the Petitioners agreed to delay filing a Motion to Set Aside the judgment while negotiations were pending. When negotiations were unsuccessfully concluded, Petitioners filed a Motion to Set Aside the Judgment as void due to the lack of notice and a hearing as well as other statutory grounds. That Motion was heard on June 27, 1988. The trial court denied the Motion without findings of fact or conclusions of law.

The Petitioners timely appealed the denial of the Motion to Set Aside Default Judgment to the Kansas Court of Appeals. Pursuant to its prerogative, the Kansas Supreme Court determined that the issues raised on appeal were significant enough to take jurisdiction from the Court of Appeals. Petitioners again raised the issue of due process violations as a result of the trial court's actions in their briefs to the Court. The Kansas Supreme Court affirmed the District Court in an opinion filed on October 17, 1989. In response to a timely Motion for Rehearing, the Court denied the same on December 18, 1989.

REASONS FOR GRANTING THE WRIT

I. THE COURT'S ACTIONS BELOW VIOLATED THE DEFENDANTS' RIGHTS TO DUE PROCESS.

Concerns of fundamental fairness, justice and confidence in the judicial system pervade this case. This is an action in which defendants, unable to obtain counsel, appeared *pro se*, sought three short extensions of Time to Answer in order to secure represntation and argued one Motion for Extension of Time to Answer. In spite of defendants' inability to obtain counsel, the judge set a

trial date on 30 days' notice. The judge failed to appear on the date set for trial, and without notice or hearing, entered default judgment against defendants even though they appeared on the appointed day for trial.

This case is littered with procedural irregularities, with multiple Motions not acted on by the trial judge, with confusing rulings, and with inaccurate representations to the Court by counsel for the plaintiff. Finally, without notice or hearing required by Kansas statute, plaintiff was granted a default judgment. This is a case in which one's sense of justice and fairness sought to be offended.

A. In Spite of the Clear Statutory Mandate, the Kansas Supreme Court Held That a Party Who Has Appeared in an Action, But Not Answered, Is in Default and Thereby Waives Any Right to Notice and a Hearing Before Entry of Default Judgment.

Relying on federal cases interpreting Fed. R. Civ. Pro. 55, which the Court found to be analogous to the Kansas Procedure Statute, K.S.A. 60-255, the Kansas Supreme Court held that notice and a hearing were unnecessary in this case. *Bazine State Bank v. Pawnee Production Service, Inc.*, 245 an. 490, 493, —— P.2d (1989). The Court made two fundamental misinterpretations of Rule 55 and K.S.A. 60-255. First, the Court determined that a hearing was required only *after* default judgment. Second, the Court determined that a hearing was required only if necessary to determine the amount of damages. *Id.* Thus, the Court erroneously concluded that under its "interpretation of federal and state rules of civil procedure governing default judgments . . ." if the amount and nature of damages claimed are not disputed and are subject to "mathematical calculation", defendants are not entitled to any kind of hearing. *Id.* at 495.

Clearly, the Kansas Supreme Court applied the wrong standard to determine the necessity of notice and a hearing. Rule 55 and K.S.A. 60-255 mandate written notice

of an application for judgment at least three (3) days prior to the hearing on application for default *if the defendant has appeared in the action*. Both also provide for a hearing on damages after entry of default judgment if the amount is unliquidated. K.S.A. 60-255 provides in pertinent part:

> If the party against whom judgment by default is sought has appeared in the action, he or she (or, if appearing by representative, his or her representative) shall be served with written notice of the application for judgment at least three (3) days prior to the hearing on such application.

Fed. R. Civ. Pro. 55 provides in pertinent part:

> If the party against whom judgment by default is sought has appeared in the action, the party (or, if appearing by representative, the party's representative) shall be served with written notice of the application for judgment at least 3 days prior to the hearing on such application.

Rule 55 and K.S.A. 60-255 also provide for a hearing on damages *after* entry of judgment if the amount is unliquidated. Thus, both Rule 55 and K.S.A. 60-255 require a hearing on *liability* if the defendant appears in the case and a post judgment hearing on *damages* if the amount is unliquidated.

B. Instead of Applying the Standard Applicable to Determine Whether Notice and a Hearing Were Required Before Entry of Default Judgment on the Issue of Liability, the Kansas Supreme Court Applied the Standard Applicable to Unliquidated Damages.

The Kansas Supreme Court entirely ignored the statutory requirement of notice and a hearing on liability. Instead, it focused on damages, which were not in issue, and concluded that a defendant who has not filed a timely answer is in default and automatically forfeits his con-

stitutional right to a hearing. *Id.* at 494. In support the Court cited *Central Operating Co. v. Utility Workers of America*, 491 F.2d 245 (4th Cir. 1984). *Central Operating* does *not* support the proposition. In that case, the defendants had neither appeared nor answered. *Id.* at 248, 251. Neither Rule 55 nor K.S.A. 60-255 provides any procedural protection for a defendant who has failed to appear in an action. Defendants who have not appeared in an action are subject to default "at any time without prior notice". *Id.* at 252.

Interestingly, the Court cited *Simmon v. Bond*, 6 Kan. App.2d 766, 634 P.2d 1148 (1981), for the proposition that failure to answer is prima facie a default. *Bazine State Bank*, 245 Kan. at 493. The Court then concluded in the next paragraph of the opinion that, because defendants were in default, no hearing was required. Had the Court analyzed *Simmon* more carefully, it would have noted that in that case the plaintiff's failure to give 3 days notice of the default hearing required the Court to vacate the judgment. Thus, the precedent cited by the Kansas Court actually stands for a quite different proposition than that for which it was cited: a defendant who has appeared in an action *is* entitled to Notice and a Hearing on default even if his failure to answer is prima facie default. *Simmon*, 6 Kan. App.2d 766.

If a party has appeared, the Federal Rule and Statute are both clear; the party *shall* be served with notice at least three (3) days prior to the hearing. Kansas precedent establishes that the three (3) day notice is a requirement if a party has appeared. *Jones v. Main*, 196 Kan. 91, 410 P.2d 303 (1966) ("Having appeared, [defendant] was entitled to the written notice prescribed by K.S.A. 60-255(a) before the court might proceed to hear plaintiff's application for judgment. The Court's action in entering judgment in his absence and without notice to him has resulted in substantial prejudice to his interests, and the judgment so obtained should have been vacated."); *Hood*

v. Haynes, 7 Kan. App.2d 591, 597, 598, 644 P.2d 1371 (1981) ("A defendant appearing is entitled to notice under the mandate of K.S.A. 60-255, and failure to give notice requires reversal of the judgment.").

II. THE COURTS ARE SPLIT ON WHETHER THE FAILURE TO GIVE A PARTY WHO HAS APPEARED IN AN ACTION NOTICE AND A HEARING PRIOR TO ENTRY OF DEFAULT JUDGMENT VIOLATES DUE PROCESS.

A. Some Courts Have Held the Failure to Give Notice and a Hearing Is a Serious Procedural Irregularity.

The cases are split on whether the failure to give the required notice before entry of default judgment automatically violates the due process requirement. Some Courts have held that a failure to make the required notice renders the judgment voidable. *See Port-Wide Container Co. v. Interstate Maintenance Corp.*, 440 F.2d 1195 (2d Cir. 1971); *Winfield Assoc., Inc. v. Stonecipher*, 429 F.2d 1087 (10th Cir. 1970) (failure to give notice is a serious procedural defect that, together with other irregularities may render the judgment void); *Gomes v. Williams*, 420 F.2d 1364 (10th Cir. 1970); *Hutton v. Fisher*, 359 F.2d 913 (2d Cir. 1966); *Rutland Transit Co. v. Chicago Tunnel Terminal Co.*, 233 F.2d 655 (7th Cir. 1956). These courts require something in addition to the failure to notify to raise due process concerns.

The Second Circuit takes a somewhat different approach holding that "failure to give the required notice is generally regarded as a serious procedural irregularity, and absent special circumstances, the lack of notice requires that the default be set aside." *Muniz v. Vidal*, 739 F.2d 699, 701 (2nd Cir. 1984) (citations omitted). In *Press v. Forest Laboratories, Inc.*, 45 F.R.D. 354 (S.D.N.Y. 1968), the Court held that a default judgment entered into without notice must be vacated as a matter of law. In accord with these cases is *Commercial Casualty Ins. Co. v. White*

Line Transfer & Storage Co., Inc., 114 F.2d 946 (8th Cir. 1940).

B. Some Courts Have Held the Failure to Give Notice and a Hearing Violates Due Process and Renders Judgment Void.

Some Federal Courts have held that, by itself, the failure to give the required notice to a defendant who has appeared constitutes a violation of due process. *Ken-Mar Airpark, Inc. v. Toth Aircraft & Accessories Co.*, 12 F.R.D. 399 (W.D. Mo. 1952). In *Sonus Corp. v. Matsushita Elec. Industries Co., Ltd.*, 61 F.R.D. 644 (D. Mass. 1974), the Court held that a default judgment entered against a plaintiff who did not answer a counterclaim or interrogatories propounded to it was void for want of due process because no notice of the hearing on default was given.

Several Courts have taken the position that the failure to give the required notice is to be considered in light of the surrounding circumstances and other facts of record to determine if the judgment is void *Collex, Inc. v. Walsh*, 74 F.R.D. (E.D. Pa. 1977); *U.S. v. Martin*, 395 F. Supp. 954 (S.D.N.Y. 1975). In *Bass v. Hoagland*, 172 F.2d 205 (5th Cir. 1949), the combination of the failure to give the required notice and other procedural imprieties deprived the defendant of due process and rendered the judgment void.

The Federal Courts appear to be split on the issue with the minority of Courts holding that if a party has appeared in an action, the failure to give the three (3) days notice prior to a hearing on default makes the judgment void. The majority of Federal Courts hold that if a party has appeared, the failure to give 3 days notice prior to a hearing on default is a serious procedural defect, which with other irregularities or in light of surrounding circumstances, may violate due process and render the judgment void. Regardless of which standard this Court would

adopt, the facts and circumstances of this case show a clear violation of due process.

III. THE FAILURE TO GIVE NOTICE AND AN OPPORTUNITY FOR A HEARING DENIED THESE DEFENDANTS DUE PROCESS UNDER EITHER STANDARD.

Even if this Court adopts the more stringent standard requiring analysis of the surrounding circumstances in addition to lack of notice and hearing on default to trigger due process concerns, the significant procedural irregularities and the circumstances surrounding this case in combination with the lack of notice and hearing on default clearly violated that standard and the defendants' right to due process. Twice the trial judge failed to rule on defendants' Motion for an Extension of Time to Answer. At a hearing set by the defendants on the second motion, the Court again failed to rule on their Motion for an Extension of Time to Answer. Instead, the Court set a trial date in 30 days with the knowledge that defendants had not yet been able to secure counsel.

In its Opinion, the Kansas Supreme Court noted that the trial court never ruled on defendants' Motion for an Extension of Time to Answer, and focused on the fact that defendants did not file an Answer by the requested deadline of March 5, 1987. The trial judge, however, recognized that the requested extensions of Time to Answer had implicitly been granted in spite of his failure to rule on the Motions. At the hearing on the Motion to Set Aside Default, the judge stated, "I believe that [defendants] appeared and essentially every time wanted more time and I kept giving him time . . .". Tr. June 27, 1989, at p. 29.

In fact, the trial court implicitly extended the due date for the defendants' Answer to the trial date. At the hearing on defendants' Motion for Extension to March 5, the following colloquy occurred between the plaintiff's attorney, the court and William Frusher for the defendants:

MR. LARSON: Well, Your Honor, I guess our point is, the law is very clear on estaglishing the times for these things to be done. That time has long expired. It expired again, and it expired again, and that's really working to the disadvantage of the bank in this case, Your Honor.

THE COURT: Well, I understand that, but I can go ahead and set it for trial, they can show up on March 23, and say we still can't hire an attorney. We try the case, Mr. Larson, and I believe the Court would set it aside. You want to try doing it that way, I'll set it for trial on March 23.

MR. LARSON: That could be fine, Your Honor.

THE COURT: And notify Mr. Allison [2], notice him.

MR. LARSON: Sure.

THE COURT: For trial.

MR. LARSON: That would be fine, Your Honor.

THE COURT: Do you think, Mr. Frusher, you'd be ready for trial on March 23rd?

MR. FRUSHER: Yes, that would be fine.

A reasonable interpretation of this colloquy is that the plaintiff's attorney thought defendants were already in default because the Court had not taken any action on defendants' Motions for extension of time. The trial court's response is somewhat ambiguous as to whether there was in fact a default, although logically it suggests that the defendants were not in default. The trial court's failure to rule on the Motion for an extension and its action in setting an expedited trial date in 30 days combined to confuse the defendants. When the Court inquired whether the defendants would be ready for trial on March 23rd, it implied that defendants were not in default and no Answer was due until then. The trial court owed a duty to these defendants to rule clearly and concisely on the motions before it. Instead, the Court considered the

[2] Mr. Allison, an attorney, had been contacted by the defendants regarding his possible representation of them in this and other matters.

Motions and failed to rule upon them in any fashion. In effect, the parties were left in limbo.

These defendants appearing *pro se* were bound to be in even greater confusion than the plaintiff who was represented by counsel. Even plaintiff's counsel was either confused by the proceedings of the hearing on February 23, 1987, or intentionally misled the Court. At the hearing on the Motion to Set Aside Default, plaintiff's attorney stated, "The 23rd date [March] was not for a trial and certainly not for a jury trial or a court trial, it was for the specific purpose of taking a default judgment." Tr. June 27, 1988, at p. 27. Obviously, no one was quite sure what the March 23rd date set by the Court meant. Where highly technical requirements are involved, and enforcing those requirements might result in a loss of the opportunity to defend a lawsuit on the merits, the rights of *pro se* litigants require careful protection. *Garaux v. Pulley*, 739 F.2d 437, 439 (9th Cir. 1984). Here, the trial court not only failed to give careful protection to those rights, but failed to act on defendants' Motions and gave confusing and conflicting orders.

Other circumstances surrounding this case also support a finding that the defendants' due process rights were violated. On the date set for trial, March 23, 1987, defendant William Frusher ("Frusher") appeared as he had indicated he would in a March 20, 1987, conversation with the trial judge's secretary. In that conversation, Frusher notified the Court that defendants were still unable to secure counsel and that Frusher would appear for trial on March 23.

According to plaintiff's attorney, Jerry Larson ("Larson"), he also appeared for trial on March 23, 1987, apparently prepared to argue the default motion only. Knowing that Frusher worked in the Courthouse and that Frusher intended to defend the action, Larson took no action other than to look around the court room, find out that the judge was not in attendance and leave.

Despite the fact that plaintiff bore the burden of proving its case at the scheduled trial, Larson purportedly appeared on behalf of the plaintiff with no witnesses, and no representative from the plaintiff Bank. He made no effort to see if defendants had already been to the Court. He made no effort to walk the few steps to Frusher's office in the Courthouse to inquire. He made no effort after leaving the Courthouse to contact defendants to reschedule. Instead, on March 25, 1987, he called the trial judge, misrepresented (unknowingly) that the defendants had not appeared for the trial date, and was directed by the judge to enter default judgment, which was done without notice and without a hearing.

Plaintiff's attorney further misled the trial court at the hearing on the Motion to Set Aside Default. At the hearing, the plaintiff's attorney raised the issue of laches, explaining that defendants waited "less than a week against a year time limit of 60-260 motions, that is when the motion to set aside default was filed." Tr. June 27, 1988, at p. 26. Counsel for defendants had, however, been involved in negotiations with plaintiff's counsel during which defendants' counsel agreed not to file a Motion to Set Aside in return for plaintiff's agreement to suspend enforcement of the default judgment granted.

IV. THE KANSAS SUPREME COURT IGNORED UNITED STATES SUPREME COURT PRECEDENT.

In *American Surety Co. v. Baldwin*, 287 U.S. 156, 77 L.Ed. 231, 53 S. Ct. 98 (1932), this Court in a decision authored by Justice Brandeis recognized that judgment entered without giving a party to an action notice and the opportunity for a hearing is void under the due process clause of the 14th Amendment. *Id.* at 161-162, 164. In *Baldwin*, the company supplying the surety bond for appeal became a party to the litigation pursuant to state law. After prevailing in part on appeal and without notice to any of the defendants or the surety, the plaintiff moved the trial court to enter judgment against one

of the defendants. While this Court held that the surety was barred from relief by its failure to raise the Constitutional issue below, it nonetheless recognized that the entry of judgment without notice and a hearing against a party appearing in an action violates the due process clause. *Id.* at 164.

No rigid definition can ever set the limits on what process is due under the Constitution. Our basic notions of fairness, reason, justice and confidence in the judicial system must be the guides to setting these limits. Justice, fairness and reason dictate that under the circumstances in this case, when a defendant has appeared and expressed an intent to defend an action, his right to due process is violated when a default judgment is entered against him without notice and a fair opportunity to be heard on the merits. Our judicial system demands scrupulous fairness to all parties to a law suit, that their interests may be protected, and that they be deprived of their interests only after adjudication by a fair and impartial tribune. These defendants never had that opportunity.

V. THE KANSAS SUPREME COURT INAPPROPRIATELY APPLIED AN "ABUSE OF DISCRETION" STANDARD TO DETERMINE WHETHER THE TRIAL COURT VIOLATED THE DEFENDANTS' CONSTITUTIONAL RIGHTS.

In its Opinion, the Kansas Supreme Court stated, "Since we have previously determined that the district judge did not abuse his discretion when originally granting the Bank's Motion for a Default Judgment, subsection (4) [K.S.A. 60-260(b)(4)] provides no basis for relief." *Bazine State Bank*, 245 Kan. at 496. Subsection (4) of K.S.A. 60-260(b) provides that a judgment may be set aside as void if inconsistent with due process. An "abuse of discretion" standard is not the standard applicable to a review a Court's actions to determine whether the Court violated a defendant's right to due process. The correct standard has long been recognized by the

Kansas Supreme Court—if the Court has acted in a manner inconsistent with due process, the judgment is void. *Automatic Feeder Co. v. Tobey*, 221 Kan. 17, 21, 558 P.2d 101 (1976). Instead the Court applied a standard that requires a finding of a due process violation by the trial Court's actions only if "no reasonable person would agree with the trial court[,]" *Bazine State Bank*, 245 Kan. at 493.

The *first* determination the Court Below should have made was whether the defendants' rights to due process were violated. Only after that determination should the Court have considered whether the trial judge abused his discretion in refusing to set aside the default. Instead, the Court Below determined that the Court had not abused its discretion and, therefore, the judgment was not void as a violation of due process. Whether the defendants' due process rights were violated by the trial court's actions was a question of law subject to a de novo review, not the abuse of discretion standard the Court below applied. *See Shillingford v. Holmes*, 634 F.2d 263 (5th Cir. 1981) (whether an injury caused by a police officer triggered liability under 42 U.S.C. § 1983 for violation of constitutional rights is a matter of law subject to de novo review). The abuse of discretion standard applied by the Court Below was clearly inappropriate to determine whether the Court's actions were inconsistent with the rights of the defendants to due process of law.

CONCLUSION

Admittedly, the facts of this case are unusual. Rarely does a judge fail to appear for trial, and then enter default judgment against a party who did appear for trial based on misinformation from the other party's counsel. The holding of the case is much broader, however. It will result in denying the right to notice and a hearing before the entry of default judgment to any party to litigation who has appeared in an action, but is for some reason

in technical default. The Kansas Supreme Court's decision means that any technical default waives the right to due process. Such a cavalier attitude toward citizen's fundamental rights fosters an atmosphere of distrust for the judicial system and raises questions of its fairness to *pro se* parties.

The defendants had a reasonable belief based on the events of the February 23, 1987, hearing that their inability to secure counsel and Answer the Petition had not jeopardized their right to a Hearing on the merits, or at least to a Hearing on default. The judge led them to believe that by appearing on the date scheduled for trial, March 23, 1987, they would preserve the right to a Hearing. Instead, after appearing on the date for trial, they were denied a hearing on the merits or even a hearing on default in violation of state statute.

Defendants ask only for what they have always sought—an opportunity to be heard on the merits of their case. Nothing more and nothing less will satisfy due process under these circumstances.

Respectfully submitted,

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Date: March 19, 1990

APPENDIX

APPENDIX

SUPREME COURT OF KANSAS

No. 62,834

BAZINE STATE BANK,

Appellee,

v.

PAWNEE PRODUCTION SERVICE, INC., WILLIAM J. FRUSHER, DAVID H. FRUSHER, MARY A. FRUSHER, and THOMAS A. FRUSHER,

Appellants.

SYLLABUS BY THE COURT

1. APPEAL AND ERROR—*Abuse of Trial Court Discretion—Appellate Review.* The test on appellate review of whether the trial court abused its discretion is whether no reasonable person would agree with the trial court. If any reasonable person would agree, an appellate court will not disturb the trial court's decision. *Hoffman v. Haug*, 242 Kan. 867, 873, 752 P.2d 124 (1988).

2. JUDGMENTS—*Default Judgment—Failure of Party to Answer after Proper Service—Due Process Guarantees May Be Forfeited by Unresponsive Defendant.* Default judgments entered for failure to answer within the time allowed, after proper service, do not violate due process. While procedural due process requires a hearing before there is a permanent deprivation of property, an unresponsive defendant may forfeit this constitutional right.

3. SAME—*Default Judgment—Relief from Final Judgment—Trial Court Discretion—Appellate Review.*

K.S.A. 60-255(b) provides: "For good cause shown the court may set aside a judgment entered by default in accordance with K.S.A. 60-260(b)." A ruling on a motion for relief from a final judgment filed pursuant to K.S.A. 60-260(b) rests within the sound discretion of the trial court. In the absence of a showing of abuse of discretion, an appellate court will not reverse the trial court's order. *In re Marriage of Zodrow*, 240 Kan. 65, Syl. ¶ 2, 727 P.2d 435 (1986).

4. APPEAL AND ERROR—*Omissions in Findings Made by Trial Court—Appellate Review.* In the absence of an objection first made in the trial court, omissions in findings will not be considered in the appellate court. The trial court is presumed to have found all of the facts in issue necessary to support the judgment.

Appeal from Ness district court; C. PHILLIP ALDRICH, judge. Opinion filed October 27, 1989. Affirmed.

Mark A. Ohlsen, of Morris, Laing, Evans, Brock & Kennedy, Chartered, of Wichita, argued the cause, and *Richard D. Greene*, of the same firm, was with him on the briefs for appellant.

F. C. "Rick" Davis, II, of Bruce & Davis, of Wichita, argued the cause, and *Kenneth H. Jack*, of the same firm, was with him on the brief for appellee.

The opinion of the court was delivered by

LOCKETT, J.: Bazine State Bank (Bank) commenced this action by alleging that Pawnee Production Service, Inc., (Pawnee) had defaulted on a note in the amount of $259,077, which had been guaranteed by William, David, and Thomas Frusher. The district court granted the Bank's motion for default judgment against the defendants for failing to timely file their answers (K.S.A.

60-255), and denied defendants' motion to set aside that judgment (K.S.A. 60-260[b]). Defendants appealed.

On December 30, 1986, the Bank filed its petition seeking possession of personal property and a money judgment against defendants William, David, Thomas, and Mary Frusher. (Pawnee, William, David, and Thomas will be referred to collectively as defendants). All defendants were personally served with summonses on the day that the petition was filed. Pawnee was served through William, as bookkeeper for the family corporation. Each of the summonses contained the following language: "If you fail to [answer within 20 days of service], judgment by default will be taken against you for the relief demanded in the petition."

On the day that answers were due, January 19, 1987, at the defendants' request, a clerk's order was entered granting all defendants until January 29 to answer or otherwise plead. Only Mary answered by the January 29 deadline. The suit against Mary was subsequently dismissed without prejudice and, although she is listed as an appellant, no judgment has been entered against her.

On January 29, instead of filing an answer, defendant William filed a second motion with the clerk seeking to extend the defendants' time to answer to February 18. No order was ever entered regarding this motion. On February 17, one day prior to their requested answer date, defendants filed notice that a hearing on their second request to extend the time to answer would be held on February 23. Defendants failed to answer on February 18.

On February 20, William filed a third motion seeking to extend the defendants' time to answer to March 5. A copy of this motion was delivered to the Bank's attorney at the February 23 hearing.

On February 23, only the Bank's attorney and William appeared for the hearing. William, appearing pro se,

indicated that defendants needed the extension in order to hire counsel. The attorney for the Bank suggested that William wanted more time in order to plan for bankruptcy and orally moved for default judgment against the nonanswering defendants. The district court considered: (1) defendants' latest motion for an extension of time to answer; and (2) the Bank's oral motion for default judgment. Without ruling on either motion, the district judge set the case for trial on March 23, 1987. Neither the Bank nor William objected to the trial setting. On February 25, notice of the Bank's motion for default judgment and notice of trial were mailed to all parties. Defendants failed to answer by the March 5 deadline they had requested.

On March 23, the Bank's attorney appeared, checked the courtroom, and found none of the defendants present. Unknown to the Bank's attorney, William, a county employee, was working in an office in the courthouse. Due to a snowstorm, the judge was unable to get to the courthouse. William claims, and the district court accepted as true, that he had the defendants' written answer and would have handed it to the judge prior to trial.

The Bank's attorney contacted the judge by telephone and stated that none of the defendants had appeared at the courthouse on March 23. In an ex parte proceeding on that date, the district court granted the Bank's motion for default judgment against the nonanswering defendants. The court found that defendants were "served on December 30, 1986; that the time for answer of the pleadings by said defendants has expired and that said defendants are wholly in default." On March 26, a copy of the notice of filing of default judgment, with a copy of the journal entry attached, was mailed to all of the defendants.

After the defendants had received notice of the default judgment, they obtained counsel to represent them. Subsequent to discussions with the defendants' attorney, the

Bank agreed to forego additional attempts to execute on its judgment while the parties negotiated a satisfaction of the judgment. Almost one year later, on March 25, 1988, two days prior to the expiration of the one-year limitation to set aside a default judgment, the defendants filed a motion to set aside the judgment, claiming that K.S.A. 60-260(b)(1), (3), (4), (5), and (6) provided grounds for relief. On June 27, 1988, the court heard and denied their motion to set aside the default judgment. The defendants appealed, claiming that the district court: (1) erred in granting the Bank's motion for default judgment without a hearing on the matter in violation of due process, and (2) abused its discretion granting the default judgment and in denying defendants' motion to set aside the default judgment.

The test on appellate review of whether the trial court abused its discretion is whether no reasonable person would agree with the trial court. If any reasonable person would agree, an appellate court will not disturb the trial court's decision. *Hoffman v. Haug*, 242 Kan. 867, 873, 752 P.2d 124 (1988). All judicial discretion must thus be considered as exercisable only within the bounds of reason and justice in the broader sense, and only to be abused when it plainly overpasses those bounds. *Stayton v. Stayton*, 211 Kan. 560, 562, 506 P.2d 1172 (1973).

K.S.A. 60-212(a) requires a defendant to answer within twenty days after the service of the summons and petition. However, this deadline may be extended if a different time is fixed by order of the court. "The purpose of an answer is to notify the court and plaintiff of the defense relied on so that the latter may prepare to meet it, and to defeat the action and bar plaintiff's recovery. Its real function is to convey information, define the issues, and show why plaintiff is not entitled to judgment." 71 C.J.S., Pleading § 99(b).

K.S.A. 60-255 provides:

> "Default (a) *Entry.* Upon request and proper showing by the party entitled thereto, the judge

> shall render judgment against a party in default for the remedy to which the party is entitled. . . . If the party against whom judgment by default is sought has appeared in the action, he or she (or, if appearing by representative, his or her representative) shall be served with written notice of the application for judgment at least three (3) days prior to the hearing on such application. If, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter, the court may conduct such hearing or order such references as it deems necessary and proper . . . ."

It is important to note that defendants filed each request for an extension of time to answer with the clerk of the district court. The defendants failed to file their answer to the petition prior to the scheduled trial date. Failure to file an answer is prima facie a default. *Simmon v. Bond*, 6 Kan. App. 2d 766, 769, 634 P.2d 1148 (1981).

While there is no Kansas case which resolves the specific issue presented here, federal courts hold that the Federal Rules of Civil Procedure require no hearing in this situation. Rule 55 requires a hearing *after* entry of default judgment only if necessary to determine the amount of damages. A hearing is not necessary if the motion for a default judgment specifies the amount that the district court is requested to award. If the nonanswering party knows the exact amount claimed and has never questioned this amount, a hearing on the amount of damages to be awarded is not required. *United States v. DeFrantz*, 708 F.2d 310, 312-13 (7th Cir. 1983). See *United Artists Corp. v. Freeman*, 605 F.2d 854, 857 (5th Cir. 1979) (a default judgment may not be entered without a hearing unless the amount claimed is a liquidated

sum or one capable of mathematical calculation); *Collex, Inc. v. Walsh*, 74 F.R.D. 443, 450 (E.D. Pa. 1977) (same).

The language in Fed. R. Civ. Proc. 55 is identical to that in K.S.A. 60-255 in all aspects relevant to this case. K.S.A. 60-255 substantially follows Rule 55, except that under 60-255 only the judge is permitted to enter a default judgment. 1 Gard's Kansas C. Civ. Proc. 2d Annot. § 60-255 (1979).

Defendants argue that the award of their property by default judgment without a hearing was a denial of their fundamental right to procedural due process. The fundamental requisite of due process of law is the opportunity to be heard. The hearing must be at a meaningful time and in a meaningful manner. *Goldberg v. Kelly*, 397 U.S. 254, 267, 25 L. Ed. 2d 287, 90 S. Ct. 1011 (1970); *In re Petition of City of Overland Park for Annexation of Land*, 241 Kan. 365, 370, 736 P.2d 923 (1987). The Bank claims that the defendants received their due process hearing on June 27, 1988, when the motion to set aside the default judgment was argued to the district court. Defendants point out that *Goldberg* and its progeny require a hearing *before* there is a final deprivation of property, not subsequent to the entry of judgment.

Federal authority is contrary to the defendants' claim that a defaulting party has a fundamental due process right to a hearing. Default judgments entered for failure to answer within the time alowed, after proper service, do not violate due process. While procedural due process requires a hearing before there is a permanent deprivation of property, an unresponsive defendant may forfeit this constitutional right. *Central Operating Co. v. Utility Workers of America*, 491 F.2d 245, 251-52 (4th Cir. 1974). See *Celco, Inc. of America v. Davis Van Lines, Inc.*, 226 Kan. 366, 368, 598 P.2d 188 (1979) (default judgment upheld; under K.S.A. 60-255(a) the trial court need only conduct such hearings as it deems necessary).

Here, the district court granted the Bank a default judgment for the amount of damages specified in its petition. Defendants, by their failure to answer, never disputed the amount or nature of the damages claimed by the Bank. The amount of damages claimed is capable of mathematical calculation. Under these circumstances and based on our interpretation of federal and state rules of civil procedure governing default judgments, we hold that the defaulting defendants were not entitled to a hearing.

K.S.A. 60-255(b) provides: "For good cause shown the court may set aside a judgment entered by default in accordance with K.S.A. 60-260(b)." A ruling on a motion for relief from a final judgment filed pursuant to K.S.A. 60-260(b) rests within the sound discretion of the trial court. In the absence of a showing of abuse of discretion, an appellate court will not reverse the trial court's order. *In re Marriage of Zodrow*, 240 Kan. 65, Syl. ¶ 2, 727 P.2d 435 (1986).

Defendants' motion to set aside the default judgment listed these subsections of K.S.A. 60-260(b) as grounds for relief:

> "(1) mistake, inadvertence, surprise, or excusable neglect; . . . (3) fraud (whether heretofore dominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon whihc it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment."

On appeal, defendants present no argument regarding subsection (5). Where the appellant fails to brief an issue, that issue is waived or abandoned, *Feldt v. Union Ins. Co.*, 240 Kan. 108, 112, 726 P.2d 1341 (1986).

While there is a need to achieve finality in litigation, judicial discretion must not achieve that end in disregard of what is right and equitable under the circumstances. Defaults are not favored in law but become necessary whent the inaction of a party frustrates the orderly administration of justice. In determining whether to set aside a default judgment, a court should resolve any doubt in favor of the motion so that cases may be decided on their merits. *Jenkins v. Arnold*, 223 Kan. 298, 299-300, 573 P.2d 1013 (1978).

Defendants primarily rely on K.S.A. 60-260(b)(4). They argue that, since they were deprived of property without a hearing, the default judgment is void. Where a judgment is attacked under subsection (4) as being void, there is no requirement that the moving party show tha the has a meritorious defense. A judgment is void if the court acted in a manner inconsistent with due process. *Automatic Feeder Co. v. Tobey*, 221 Kan. 17, 21, 558 P.2d 101 (1976). A void judgment is a nullity and may be vacated at any time. *Universal Modular Structures, Inc. v. Forrest*, 11 Kan. App. 2d 298, 300, 720 P.2d 1121 (1986).

Since we have previously determined that the district judge did not abuse his discretion when originally granting the Bank's motion for a default judgment, subsection (4) provides no basis for relief.

Defendants argue that K.S.A. 60-260(b)(1), (3), and (6)provide grounds for relief. As for subsection (1), defendants assert the default was not due to inexcusable neglect or a willful act. In fact, defendants argue that they performed as they were required—they appeared for the hearing on the motion for default judgment, which was cancelled due to a snowstorm; they had prepared handwritten answers; and they were prepared to testify and put on their evidence.

This assertion ignores the fact that, even though the defendants had filed with the clerk of the district court

three requests for additional time to answer, they failed to file their answer to the petition with the clerk. K.S.A. 1988 Supp. 60-205 requires the filing of pleadings and other papers with the clerk of the court, except when the judge allows them to be filed with him or her. At the June 27 hearing on the motion to have the default judgment set aside, the district judge concluded: "Well, Mr. Frusher had plenty of time to get counsel and get something on file. We gave him plenty of time. The default judgment that was entered, I would decline to set aside." Under the facts, there was no abuse of discretion in refusing to set aside the judgment under subsection (1).

As for subsection (3), defendants assert that the Bank's attorney fraudulently represented to the court that "no one appeared on behalf of the defendants" at the March 23 hearing, which was cancelled. The only indication in the record as to what the Bank's attorney told the court is as follows:

> "Mr. Larson [the Bank's other attorney] makes it to the courthouse. There is a snow storm. Your Honor isn't here, he [Larson] checks the courtroom, didn't see anybody, goes out. And calls Your Honor a couple days later and says, Your Honor I was there, didn't see anybody else there. What am I going to do?"

Defendants allege that the Bank's "misrepresentation" caused the district court to deny their motion to set aside the default judgment. This claim is contrary to the record. William stated that he did appear and was prepared to hand the judge the defendants' answer; the district judge said that he believed him. The district court was obviously not misled and the record does not support defendants' allegations of fraud. There was no abuse of discretion when the district judge refused to set aside the default judgment under subsection (3).

As for subsection (6), defendants argue: "Even had the lack of a hearing not risen to the level of a denial of

due process, surely the fact that no hearing was held raises equitable consideration as to basic fairness." This is a variation on their previous due process argument regarding subsection (4). The question is the same: Did the district court abuse its discretion by finding that equity did not require setting aside the default judgment? As previously decided, there was no abuse of discretion.

Defendants argue that the default judgment is void as against David since: (1) the Bank's petition alleged that Mary guaranteed David's indebtedness; and (2) the district court dismissed the Bank's action against Mary without prejudice. Where one of several defendants who is alleged to be jointly and severally liable defaults, judgment should not be entered against the defaulting defendant until the matter has been adjudicated with respect to all defendants or all defendants have defaulted. *Reliance Insurance Companies v. Thompson-Hayward Chemical Co.*, 214 Kan. 110, Syl. ¶ 4, 519 P.2d 730 (1974).

The Bank argues that, because defendants failed to raise this argument at the hearing on their motion to set aside the default judgment, they are estopped from raising it now. We agree. A point not raised before or presented to the trial court cannot be raised for the first time on appeal. *Kansas Dept. of Revenue v. Coca Cola Co.*, 240 Kan. 548, 552, 731 P.2d 273 (1987).

In addition, *Reliance* involved a claim against joint tortfeasors, and the release of one joint tortfeasor would have released them all. 214 Kan. at 118. Here, each defendant was liable for the entire obligation as a joint debtor, not a joint tortfeasor. The Bank was, therefore, able to release Mary, a joint debtor, without prejudicing its claims against the other debtors. When two or more debtors are jointly and severally liable on an obligation, the release of one of the debtors discharges the obligation of the other debtor *only* to the extent of the consideration paid for said release. See *Misco Leasing, Inc. v. Bush*, 208 Kan. 45, Syl. ¶ 1, 490 P.2d 367 (1971).

Defendants finally argue that this case should be remanded for a hearing since the district court's order denying their motion to set aside the default judgment "states neither the controlling facts nor the legal principles controlling the decision." They cite *Read v. Estate of Davis*, 213 Kan. 128, Syl. ¶ 3, 515 P.2d 1096 (1973), which states:

> "Where the findings and conclusions of the trial court are inadequate to permit meaningful appellate review, the appellate court has no alternative but to remand the case for new findings and conclusions."

At the hearing on the defenadnts' motion to set aside the default judgment, neither party presented evidence. The district judge denied the motion to set aside the default judgment after reviewing the court file and hearing arguments of counsel. The Bank points out that, unlike the appellants in *Read*, the defendants here did not raise this objection in the district court; therefore, it is presumed that the district judge found all the facts necessary to support the judgment. In *Celco, Inc. of America v. Davis Van Lines, Inc.*, 226 Kan. at 369, where a similar argument arose, we noted that the record was void of any indication that the appellants objected to the absence of findings and conclusions at the trial level. 1 Gard's Kansas C. Civ. Proc. 2d Annot. § 60-252 (1979) states: "It is well established in Kansas that in the absence of an objection first made in the trial court omissions in findings will not be considered in the appellate court. The trial court is presumed to have found all of the facts in issue necessary to support the judgment." See *Southwest Nat'l Bank of Wichita v. ATG Constr. Mgt., Inc.*, 241 Kan. 257, 265, 736 P.2d 894 (1987).

Affirmed.

Six, J., not participating.

IN THE DISTRICT COURT OF
NESS COUNTY, KANSAS

Case No. 86 C 108

BAZINE STATE BANK,
Plaintiff,

vs.

PAWNEE PRODUCTION SERVICE, INC., *et al.*,
Defendants.

Pursuant to Chapter 60 of
Kansas Statutes Annotated

ORDER

[Filed Aug. 15, 1988]

NOW on this 27th day of June, 1988, this matter comes on for hearing upon the motion of defendants, Pawnee Production Service, Inc., William J. Frusher, David H. Frusher, and Thomas A. Frusher, to set aside the judgment herein.

The Court after hearing argument of counsel, reviewing the file and affidavits in support of the motion, FINDS, ORDERS AND DECREES that defendants' motion should be denied and the judgment herein remain in full force and effect.

IT IS SO ORDERED.

[SEAL]

s C. Phillip Aldrich
Judge

APPROVED:

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